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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~463.~~ 187

THE TOWNSHIP OF LINCOLN, PLAINTIFF IN ERROR,

vs.

THE CAMBRIA IRON COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 3, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 463.

THE TOWNSHIP OF LINCOLN, PLAINTIFF IN ERROR,

vs.

THE CAMBRIA IRON COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN:

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1 Supreme Court of the United States.

THE TOWNSHIP OF LINCOLN, PLAINTIFF IN error,
vs.
THE CAMBRIA IRON COMPANY, DEFENDant in error.

To the clerk of the circuit court of the United States for the western district of Michigan.

The above named township of Lincoln, hereby makes application to you to obtain a writ of error from the said Supreme Court to be directed to the said circuit to bring up the record in a certain suit lately depending therein, wherein the above named defendant, The Cambria Iron Company was plaintiff and the said Township of Lincoln was defendant, in a plea of trespass on the case upon promises, the said Township of Lincoln complaining that error hath intervened in the said record to its detriment.

You will please issue the said writ in the usual form and make the same returnable on the first day of the next ensuing term of the said Supreme Court.

Yours,

HENRY F. SEVERENS,
Attorney for the Pl'ff in Error.

Dated July 19th, A. D. 1877.

(Indorsed:) Supreme Court of the United States. The Township of Lincoln, pl'ff in error, vs. The Cambria Iron Company, defend't in error. Application for writ of error. Received and filed July 19, 1877. C. B. Hinsdill, clerk. Henry F. Severens, att'y for pl'ff in error.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the circuit court of the United States for the western district of Michigan, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you Solomon L. Withey, district judge sitting as circuit judge, between The Cambria Iron Company, plaintiff, and The Township of Lincoln, defendant, a manifest error hath happened to the great damage of the said defendant as by its complaint appears. We being willing that error if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said

Supreme Court, the 19th day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL] CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan,
By A. B. CARRIER, *Deputy.*

Allowed by—

S. L. WITHEY,
Dist. Judge.

(Indorsed:) Supreme Court of the United States. The Township of Lincoln, pl'ff in error, vs. The Cambria Iron Company, def't in error. Writ of error. Henry F. Severens, att'y for pl'ff in error.

3 The United States of America, to the Cambria Iron Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Michigan, wherein The Township of Lincoln is plaintiff in error and you are defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of said Supreme Court this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

S. L. WITHEY,
District Judge of the United States for the Western District of Michigan.

UNITED STATES OF AMERICA,
Western District of Michigan ss:

C. K. Turner being duly sworn says that he served the above
4 citation by delivering a true copy thereof duly indorsed with a notice of which the notice hereon indorsed is a copy on Mitchell J. Smiley, one of the members of the firm of Hughes, O'Brien & Smiley, who were the attorneys for the defendant in error in the court below, on the 19th day of July, A. D. 1877.

C. K. TURNER.

Subscribed & sworn to before me this 19th day of July, A. D. 1877.
A. B. CARRIER,
Notary Public.

(Indorsed:) Supreme Court of the United States. The Township of Lincoln, pl'ff in error, vs. The Cambria Iron Company, def't in error. Citation.

To HUGHES, O'BRIEN & SMILEY,
Attorneys for Defendant in Error in the Court Below:

Take notice that the within is a true copy of the original citation issued in the above entitled cause.

Yours &c.,

HENRY F. SEVERENS,
Att'y for Pl'ff in Error.

Dated July 19th, A. D. 1877.

HENRY F. SEVERENS,
Att'y for Pl'ff in Error.

5 Know all men by these presents that we, The Township of Lincoln, as principal, and Ansel Stone, Laroy W. Archer, and E. A. Graham, all of the township of Lincoln, as sureties, are held and firmly bound unto The Cambria Iron Company in the just and full sum of twelve thousand dollars, to be paid to the said Cambria Iron Company or its assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 17th day of July, A. D. 1877.

Whereas lately, at a session of the circuit court of the United States for the western district of Michigan, in a suit depending in said court between the said Cambria Iron Company, as plaintiff, and the said Township of Lincoln, as defendant, judgment was rendered against the said Township of Lincoln, and the said Township of Lincoln having obtained a writ of error from the Supreme Court of the United States, directed to the said circuit court, and filed a copy thereof in the office of the clerk of said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Cambria Iron Company, citing and admonishing it to be and appear at a Supreme Court
6 of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of this obligation is such that if the said Township of Lincoln shall prosecute its said writ of error to effect and also answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE TOWNSHIP OF LINCOLN,
By A. D. BROWN, [SEAL.]
Supervisor.
ANSEL STONE. [SEAL.]
LARY W. ARCHER. [SEAL.]
E. A. GRAHAM. [SEAL.]

Signed, sealed, and delivered in presence of—
JAMES H. JOHNSON.
L. W. ARCHER.

Approved by—

S. L. WITHEY,
Dist. Judge.

(Indorsed:) Supreme Court of the United States. The Township of Lincoln, pl'ff in error, vs. The Cambria Iron Company, def't in error. Supersedeas bond. Received and filed June 19th, 1877. Chester B. Hinsdill, clerk. Henry F. Severens, att'y for pl'ff in error.

7 Supreme Court of the United States.

THE TOWNSHIP OF LINCOLN, PL'FF IN ERROR,
vs.
THE CAMBRIA IRON COMPANY, DEFENDANT in error.

TO HUGHES, O'BRIEN & SMILEY,
Attorneys for Defendant in Error in the Court Below:

GENTLEMEN: You will please take notice that on the 19th day of

July, A. D. 1877, having previously sued out a writ of error in the above cause, I lodged a copy of said writ for the defendant in error with the clerk of the circuit court of the United States for the western district of Michigan, and at the same time deposited a supersedeas bond, duly approved by the honorable S. L. Withey, district judge, with said clerk, which bond was executed by the plaintiff in error and sureties to the above-named Cambria Iron Company.

Yours, &c.,

HENRY F. SEVERENS,
Att'y for Pl'ff in Error.

Dated July 19th, A. D. 1877.

8 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

C. K. Turner, being duly sworn, deposes and says that on the 19th day of July, A. D. 1877, he served on Mitchell J. Smiley, one of the members of the firm of Hughes, O'Brien & Smiley, within named, a notice of which the within is a copy, by delivering the same to him personally, at Grand Rapids, in said western district of Michigan.

C. K. TURNER.

Subscribed and sworn to before me this 19th day of July, A. D. 1877.

A. B. CARRIER,
Notary Public.

(Indorsed:) Supreme Court of the United States. The Township of Lincoln, pl'ff in error, vs. The Cambria Iron Company, def't in error. Notice of lodging of copy of writ of error & bond. Received and filed Jul. 19th, 1877. C. B. Hinsdill, clerk. Henry F. Severens, att'y for pl'ff in error.

9 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

The circuit court of the United States for the western district of Michigan.

The Cambria Iron Company, of Johnstown, Pennsylvania, a corporation duly organized, incorporated, and existing under and by virtue of the laws of the State of Pennsylvania, and a citizen of said State, by Hughes, O'Brien & Smiley, its attorneys, filing this declaration, as commencement of suit, complains of the Township of Lincoln, a body corporate and politic, in the county of Berrien, in said district, created and existing under and by virtue of the laws of the State of Michigan, and citizen of said State and of the said western district thereof, in a plea of trespass on the case upon promises.

For that whereas heretofore the people of the State of Michigan, in due form, by their legislature, did enact and pass an act to enable any township, city, or village to pledge its aid by loan or donation to any railroad company then chartered or organized, or that might thereafter be organized, under and by virtue of the State of Michigan, in
10 the construction of its road, which said act was duly approved on the 22d day of March, A. D. 1869.

And that on, to wit, the 1st day of June, A. D. 1869, for a long space of time prior thereto, the Chicago and Michigan Lake Shore Railroad Company was a corporation duly organized under and by virtue of the

laws of the State of Michigan, having for its object the construction of a railroad from the village of New Buffalo, in said county of Berrien, northward to a great distance beyond the limits of said county, which route extended through and across the said township of Lincoln.

That on, to wit, the said first day of June, A. D. 1869, the said defendant, the Township of Lincoln, acting under and in accordance with the authority conferred upon it by the said act of the legislature of the State of Michigan, made a certain donation to the said Chicago & Michigan Lake Shore Railroad Company, and for that purpose did make and execute four certain bonds or obligations, numbered respectively one, two, three and four, bearing date the said first day of June, A. D. 1869, each for the sum of one thousand dollars, wherein and whereby,

11 in each of which said bonds, the said defendant acknowledged that it owed and promised to pay to the said Chicago & Michigan Lake Shore Railroad Company, or bearer, one thousand dollars, lawful money of the United States of America, as follows: No. one, on the first Monday of February, 1870; No. two, on the first Monday of February, 1871; No. three, on the first Monday of February, 1872; No. four, on the first Monday February, 1873; at the office of the treasurer of the county of Berrien, with interest at the rate of ten per centum per annum, payable annually on the first Monday in February, in each year, according to the terms of certain coupons severally annexed to each of said bonds and delivered therewith.

Which said bonds, numbered as aforesaid, were afterwards on, to wit, the 28th day of December, A. D. 1869, duly delivered to said Chicago & Michigan Lake Shore Railroad Company, as provided in and by said act of the legislature of the State of Michigan.

And the said plaintiff avers that it now is, and for a long space of time, to wit, since December 30th, A. D. 1869, and before said bonds became due, has been the lawful owner, holder, and bearer of each of said bonds for value, and entitled to demand and receive payment of the said sums of money in said *lands* specified, together with the interest thereon.

12 And the said defendant, in consideration of the premises, to wit, at Grand Rapids in said district, on, to wit, the 30th day of October, A. D. 1875, promised to pay the amount of the said several bonds to the plaintiff according to the tenor and effect thereof when thereunto afterwards requested so to do.

And the said plaintiff avers that the time of payment of each of said bonds has long since elapsed, and that they remain due and unpaid although payment of the same has severally been demanded at the office of the county treasurer of said Berrien County.

And the said defendant not regarding its said promises, although often requested so to do, has not paid the said sums of money, or any part thereof, to the said plaintiff, but has wholly neglected and refused, and still neglects and refuse so to do, to wit, at Grand Rapids in said district, to wit, at said county treasurer's office, to the damage of the said plaintiff ten thousand dollars.

For that whereas, also, the said defendant acting under the authority in that behalf given it by the act of the legislature of the State of Michigan, set forth in the first count of this declaration, hereto-

13 fore, to wit, on the first day of June, A. D. 1869, at the same township of Lincoln, in said district, made a certain other donation to the said Chicago & Michigan Lake Shore Railroad Company, and for that purpose did make and execute four certain other bonds or obligations numbered respectively six, seven, eight, and nine, bearing date

the said first day of June, A. D. 1869, each for the sum of one thousand dollars, and in each of which said bonds the said defendant promised to pay to the said Chicago & Michigan Lake Shore Railroad Company, or bearer, one thousand dollars, on, to wit, the first Monday of February, A. D. 1877, at the office of the treasurer of the county of Berrien, with interest at the rate of ten per centum per annum, payable annually on the first Monday of February in each year, according to the terms of certain coupons severally annexed to each of said bonds, and delivered therewith, which said bonds with coupons thereto attached, numbered as aforesaid, were afterwards on, to wit, the 28th day of December, A. D. 1869, duly delivered to said Chicago & Michigan Lake Shore Railroad Company as provided in and by said act of the legislature of the State of Michigan.

And the said plaintiff avers that the said coupons so attached
14 to each of said bonds and delivered therewith as aforesaid were and are each and all in the form of promises by the said defendant to pay the bearer at the office of the treasurer of the county of Berrien the sum of one hundred dollars, and signed by the supervisor and clerk of said Township of Lincoln, the said defendant.

And the said plaintiff further avers that it now is, and for a long space of time, to wit, since December 30th, A. D. 1869, and before said coupons became due, has been the lawful owner, holder and bearer for value of four of said coupons as follows:

One of said coupons on bond No. 6, for one hundred dollars, and due on the first Monday of February, 1875.

One of said coupons on bond No. 7, for the sum of one hundred dollars, and due on the first Monday of February, 1875.

One of said coupons on bond No. 8, for the sum of one hundred dollars, and due on the first Monday of February, 1875; and

One of said coupons on bond No. 9, for the sum of one hundred, and due on the first Monday of February, 1875, and entitled to demand and recover payment of the said sums of money of said coupons specified and promised to be paid to the bearer thereof as aforesaid.
15 And the said plaintiff further avers that the time of payment of each of said coupons has long since elapsed and that they and each of them remain due and unpaid, although payment of the same has severally been demanded at the office of the county treasurer of said Berrien County.

And the said defendant in consideration of the premises, to wit, at Grand Rapids, in said district, on, to wit, October 30th, A. D. 1875, promised to pay the amount of the said several coupons to the plaintiff according to the tenor and effect thereof when thereunto afterwards requested so to do.

Yet the said defendant, not regarding its said promises and undertakings, has not paid the said sums of money or any part thereof, although often requested so to do, but has wholly neglected and refused and still neglects and refuses so to do, to wit, at Grand Rapids, in said district, to wit, at said county treasurer's office, to the said plaintiff's damage ten thousand dollars.

And for that whereas the said defendant on the 30th day of October,
A. D. 1875, was indebted to the said plaintiff in ten thousand dol-
16 lars for the price and value of goods sold and delivered by the plaintiff for the defendant at its request, and in a like sum *and in a like sum* for the price and value of work done and materials for the same provided by the plaintiff for the defendant at its request, and in a like sum for the price and value of work done by plaintiff at its request;

and in a like sum for money lent by the plaintiff to the defendant at its request, and in a like sum for money paid by plaintiff for the defendant at its request; and in a like sum received by the defendant for the use of the plaintiff, and in a like sum of money found to be due from the defendant to the plaintiff on an account stated between, and in a like sum for the use of money due from the defendant to the plaintiff and by the plaintiff forborne to the defendant at its request.

And whereas the defendant afterwards, and on the day and year aforesaid, in consideration of the premises respectively promised said plaintiff to pay it the said several sums of money respectively on request, yet it has disregarded its said promises and has not paid any of said moneys or any part thereof, to the plaintiff's damage of ten thousand dollars, and therefore it brings suit, &c.

HUGHES, O'BRIEN & SMILEY,
Attorneys for Plaintiff.

17 (Indorsed:) United States circuit court for the west. dist. of Mich. The Cambria Iron Company vs. The Township of Lincoln.

Narr.

To the within named defendant:

Take notice, that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit, a rule was entered in the book of common rules, kept by the clerk of said court, in his office in the city of Grand Rapids, in the county of Kent and State of Michigan, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof, and notice of said rule or judgment, etc.

Yours, etc.,

HUGHES, O'BRIEN & SMILEY,
Plaintiff's Attorneys.

Filed Nov. 19, A. D. 1875.

CHESTER B. HINSDILL, *Clerk.*

UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I hereby certify and return that on the 23d day of November, A. D. 1875, I served the annexed declaration on The Township of Lincoln, the defendant within named, by delivering a true copy thereof personally to Alonzo D. Brown, the supervisor of said township defendants, which said copy had endorsed thereon a notice to plead as is hereon endorsed, but after service on Alonzo D. Brown, he notified me that he had resigned for the purpose of avoiding the service of the within writ, but that the Township of Lincoln had appointed him, the said Brown, to spread the tax-roll of said town.

JOHN PARKER,
U. S. Marshal,
By S. J. BAILEY,
Deputy "

18 October term, A. D. 1875.

THE CAMBRIA IRON COMPANY
vs.
THE TOWNSHIP OF LINCOLN.

In this cause, on reading and filing declaration as commencement of suit and on motion of Hughes, O'Brien & Smiley, attorneys for plaintiff,

ordered that said defendant appear and plead to said declaration within twenty days after service upon it of a copy thereof, together with notice of this rule or judgment, &c.

HUGHES, O'BRIEN & SMILEY,
Plaintiff's Attorneys.

19 The circuit court of the United States for the sixth circuit and western district of Michigan.

THE CAMBRIA IRON COMPANY }
vs.
THE TOWNSHIP OF LINCOLN. }

The said Township of Lincoln, by George S. Clapp, its attorney, comes and prays judgment of the declaration & notice, & notice thereon of rule to plead in this cause, delivered to one Alonzo D. Brown, because that the said Township of Lincoln is a municipal corporation deriving its existence only by and under the statutes of the State of Michigan, and that according to the statutes of said State it cannot be sued, except that service of process or of a declaration with notice of rule to plead be served by delivering the same to the supervisor of such township. And this defendant saith that in this cause the copy of the declaration which was filed as commencement of suit in this court and cause, and the notice of rule to plead endorsed on such copy of declaration, was delivered to one Alonzo D. Brown, on the 23d day of November, A. D. 1875, and that at the time of such said service of said copy of declaration and the notice of rule to plead on said Alonzo D.
20 Brown, he was not supervisor of said Township of Lincoln; that on or before the 7th day of October, A. D. 1875, there was a vacancy in the office of supervisor of said Township of Lincoln. That on *on* said 7th day of October, A. D. 1875, the township board of the Township of Lincoln appointed said Alonzo D. Brown to be its supervisor; that afterwards said Alonzo D. Brown never accepted said office, nor did he at that time accept said office, and that he did not then, and never since has he qualified as such supervisor by taking any oath of office as such supervisor, nor had he on or before said 23d day of November accepted such office or taken any oath of office as such, or entered on the duties of such office of supervisor.

GEO. S. CLAPP,
Defendant's Att'y.

UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Alonzo D. Brown, being duly sworn, says that the above plea is true in substance and in fact.

A. D. BROWN.

Sworn to and subscribed before me this 13th day of December, A. D. 1875.

ISAAC H. PARRISH,
U. S. Commissioner, West. Dist. of Mich.

21 The circuit court of the United States for the sixth circuit and western district of Michigan.

THE CAMBRIA IRON COMPANY
vs.
THE TOWNSHIP OF LINCOLN.

This defendant not waiving any matter or thing by it set up in, claimed and maintained in its plea in abatement in this cause made, but proceeding according to rule number one hundred and two of the rules of practice prescribed by the supreme court of the State of Michigan for the government of circuits of the said State of Michigan, this defendant comes and demands trial of the matters and things in the plaintiff's declaration contained.

GEO. S. CLAPP,
Defendant's Att'ys.

To Messrs. HUGHES, O'BRIEN & SMILEY,
Plaintiff's Attorneys:

Please take notice that under the plea of the general issue above pleaded, the defendant will give in evidence and show that the said plaintiff is not, and was not at the time of the commencement of this suit, the owner of any of the obligations mentioned and referred to in the plaintiff's declaration and in the notice attached thereto, and
22 never has been the owner thereof; that the owner of said obligation and evidence of debt is the Chicago & Michigan Lake Shore Railroad Company, a corporation organized, created and existing by virtue of and under the statutes of Michigan, and which corporation is a resident and a citizen of the State of Michigan within the intent and meaning of the acts of Congress authorizing suits to be brought and maintained in the circuit courts of the United States, and that this suit is brought by agreement between the said plaintiff and the said corporation, The Chicago & Michigan Lake Shore Railroad Company, that such suit should be brought by said The Chicago and Michigan Lake Shore Railroad Company and maintained by it in the name of the said plaintiff, so this said corporation, the said Chicago & Michigan Lake Shore Railroad Company, might bring suits in the circuit courts of the United States to the wrong and fraud of this said court and of this defendant, which defendant is entitled as of right to be sued by said corporation, The Chicago & Michigan Lake Shore Railroad Company, and to defend in the State courts of the State of Michigan, and ought not to be compelled to answer this plaintiff of or touching such matters while prosecuting for said corporation, the said Chicago & Michigan Lake Shore Railroad Company.

23 Please also take further notice that under the said plea of the general issue above pleaded, said defendant will further give in evidence and show, that as touching all of said matters of indebtedness referred to in the plaintiff's declaration, this defendant is, and when said bonds and coupons were issued and signed and before that time was, a municipal corporation created and existing under and by the laws of the State of Michigan; that whatever of indebtedness is referred to in said declaration & notice, arose by reason of a vote of certain of the electors of said Township of Lincoln to aid in the construction of the railroad of The Chicago & Michigan Lake Shore Railroad Company, a corporation organized and created under and by the statutes of the State of Michigan.

That said bonds and coupons referred to in said declaration were delivered to said railroad company in fraud of said Township of Lincoln.

That when said bonds and the coupons for interest were so delivered, the road bed of the said railroad was not completed; that through said township of Lincoln the culverts were not built nor were the bridges done or completed, nor was said railroad fenced, nor were the ties laid down, nor was the iron laid thereon, nor had the road crossings been completed, nor the cattle guards constructed.

24 That said bonds and coupons were procured by fraud; that said plaintiff is not a bona-fide holder for value of said bonds and coupons; that in fact the said Chicago & Michigan Lake Shore Railroad Company is, and at the time of the commencement of this suit was, the owner of all such evidences of indebtedness, and the same are held by said plaintiff, not as owner, but as collateral security for a debt owing it by said Chicago & Michigan Lake Shore Railroad Company, and with an agreement that this suit shall be maintained and carried on by said Chicago & Michigan Lake Shore Railroad Company, and when it, said plaintiff, received said bonds and coupons, it took the same with full knowledge of all the fraud wrought upon this defendant by the aforesaid wrongful delivery of said bonds and coupons, and with no other or greater right than had said railroad company,

Wherefore said plaintiff ought not to have or maintain any action against this defendant.

GEO. S. CLAPP,
Defendant's Attorney.

(Indorsed:) Circuit court of the United States for the western district of Michigan. The Cambria Iron Company vs. The Township of Lincoln. Plea and notice. Filed December 13th 1875. Chester B. Hinsdill, clerk. Geo. S. Clapp, def't's att'y.

25 The circuit court of the United States for the western district of Michigan.

THE CAMBRIA IRON COMPANY
vs.
THE TOWNSHIP OF LINCOLN.

And the said plaintiff says that the said plea of the said defendant and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law, and that the said plaintiff is not bound by the law of the land to answer the same, and this it is ready to verify.

Wherefore for want of a sufficient plea in this behalf the said plaintiff prays judgment and that the said defendant may answer further to the said declaration, &c.

And the said plaintiff according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer, that is to say:

For that the said Township of Lincoln by its plea aforesaid shows that on the seventh day of October, 1875, there was a vacancy in the
26 office of supervisor of Township of Lincoln, but it nowhere appears in and by said plea how long said vacancy had existed nor by what means or cause it occurred.

And also for that the said defendant has not in and by its said plea stated or shown who was the supervisor of the said township of Lincoln on the 23rd day of November, A. D. 1875.

And also for that the said defendant has not, in and by its said plea, given or shown to the said plaintiff a better writ.

And also that the said plea is in other respects uncertain, informal and insufficient, &c.

HUGHES, O'BRIEN & SMILEY,
Attorneys for Plaintiff.

27 (Indorsed:) The circuit court of the United States for the W. dist. of Mich. The Cambria Iron Co. vs. The Township of Lincoln. Demurrer to plea in abatement. Filed Dec. 24th, 1875. Chester B. Hinsdill, clerk. Hughes, O'Brien & Smiley, att'ys for pl'ff.

U. S. OF AMERICA,
W. Dist. of Mich., ss:

Isadore Danziger being duly sworn deposes and says that on the 24th day of December, 1875, he served a copy of demurrer to plea in abatement on Geo. S. Clapp, esq., attorney for the defendant in the above entitled cause by depositing the same at the post office in the city of Grand Rapids, postage prepaid, and directed to Geo. S. Clapp, esq., att'y at law, St. Joseph, Michigan, that being his true address to the best of deponent's knowledge.

I. DANZIGER.

Subscribed & sworn to before me this 24th day of December, A. D. 1875.

E. F. SWEET,
Notary Public, Kent County, Michigan.

28 October term, A. D. 1875.

THE CAMBRIA IRON COMPANY
vs.
THE TOWNSHIP OF LINCOLN.

FEBRUARY 3D, 1876.

In this cause on filing due proof of the filing of a demurrer on the part of said plaintiff to the plea in abatement heretofore filed in said cause by said defendant, and of due personal service of a copy thereof on said defendant's attorney, and that more than ten days have elapsed since such filing and service as aforesaid and that no joinder in demurrer by or on behalf of said defendant has been filed in said cause nor copy thereof served on said plaintiff's attorneys, it is ordered, on motion of Hughes, O'Brien & Smiley, attorneys for said plaintiff, that the default of said defendant for not joining in said demurrer be, and the same is hereby entered herein.

HUGHES, O'BRIEN & SMILEY,
Plaintiff's Attorneys.

29 October term, A. D. 1875.

THE CAMBRIA IRON COMPANY
vs.
THE TOWNSHIP OF LINCOLN.

FEBRUARY 8TH, 1876.

In this cause the default of said defendant having been duly entered for want of joinder in demurrer therein and more than two days in term

time having and no motion having been made to set the same aside, on motion of Hughes, O'Brien & Smiley, attorneys for said plaintiff, it is ordered that said default be and the same is hereby made absolute.

HUGHES, O'BRIEN & SMILEY,
Plaintiff's Attorneys.

30 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 29 day of May, in the year of our Lord one thousand eight hundred and seventy-six and of the Independence of the United States of America the one hundredth, present the honorable Solomon L. Withey, district judge, among the proceedings then and there had were the following, to wit:

THE CAMBRIA IRON COMPANY
vs.
THE TOWNSHIP OF LINCOLN.

This cause having been called for trial the following jury was called and sworn, to wit: A. B. Slawson, R. E. Mathews, Horton Crandall, Jessie Stone, Aaron B. Miner, Robert Thompson, John Hamlin, George W. Garde, Thaddeus L. Waters, Le Grand Whitcomb, C. W. Guinup, and Richard Byron, who sat together in the jury box and heard the evidence this day adduced, the arguments of counsel, and the charge of the court, and without leaving their seats say upon their oath that the defendant is guilty in manner and form as alleged in the declaration, and assess its damages at the sum of six thousand two hundred seventy three dollars and thirty-two cents over and above its costs and charges. It is therefore considered by the court that the said plaintiff do recover against the said defendant the said sum so assessed together with its costs and charges to be taxed and that it have execution therefor.

31 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, Chester B. Hinsdill, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, do hereby certify that the foregoing is a true copy of the records and files, and all of them, of the proceedings of said court in said entitled cause.

Witness my official signature and the seal of said court in Grand Rapids, this 4th day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] CHESTER B. HINSDILL, *Clerk*,
By A. B. CARRIER, *Deputy.*

(Indorsement on cover:) No. 463. The Township of Lincoln, pl'ff in error, vs. The Cambria Iron Company. W. Michigan C. C. U. S. Filed 3rd September, 1878.

OFFICE SUPREME COURT U.S.
FILED
DEC 30 1880

SUPREME COURT

OF THE UNITED STATES.

NO. 189.

THE TOWNSHIP OF LINCOLN,
Plaintiff in Error,

vs.

THE CAMBRIA IRON COMPANY,
Defendant in Error.

BRIEF FOR PLANTIFF IN ERROR.

H. F. SEVERENS,
Counsel for Plaintiff in Error.

KALAMAZOO. MICH:
H. H. EVERARD & CO., BOOK AND JOB PRINTERS.
1880.

SUPREME COURT

OF THE UNITED STATES.

THE TOWNSHIP OF LINCOLN,
Plaintiff in Error,
vs.
CAMBRIA IRON COMPANY,
Defendant in Error.

ABSTRACT OF THE CASE.

On the 19th day of November, 1875, the Cambria Iron Company, for the purpose of commencing suit against the Township of Lincoln, filed a declaration and entered a rule to plead, in the Circuit Court for the Western District of Michigan.

That declaration contained two special counts to which were added the common counts in assumpsit.

The first of these special counts stated the plaintiff to be a Pennsylvania corporation, and the defendant to be a

corporation politic in the Western District of Michigan,—that the Legislature of Michigan passed an act, approved March 22d, 1869, to enable any Township to pledge its aid by loan or donation to any railroad company then or thereafter organized under the laws of that State,—that the Chicago & Michigan Lake Shore Railroad Company was such a corporation, contemplating the building of a railroad from New Buffalo through said Township of Lincoln, beyond the limits of Berrien County.

That under said act the Township of Lincoln made a certain donation to the said railroad company, and for that purpose made, June 1st, 1869, four numbered bonds for one thousand dollars each, which it promised to pay to the said company, or bearer, on the first Monday in February in each of the years 1870, 1871, 1872 and 1874, at the office of the Treasurer of Berrien County, with annual interest at ten per cent. according to certain coupons thereto attached. That those bonds were, Dec. 28, 1869, delivered to said company as provided by said act. That the plaintiff now is, and for a long space of time has been, the lawful owner, holder and bearer of each of said bonds for value; and that the township in consideration of the premises promised to pay the amount of said bonds to him, and that payment had not been made although demanded at the County Treasurer's office. (Record, fols. 9 to 13.)

The second special count is in the same terms, except that it alleges the making, at the same time, by the defendant, of four other bonds, payable first Monday in February, 1877, with interest payable annually at ten per cent. according to certain coupons attached thereto, to bearer at the County Treasurer's office; and each of said coupons was signed by the Supervisor and Clerk of the Township, and that the plaintiff became a holder for value of four of said coupons, due February, 1875, before they became due. (Record, fols. 13 to 17.)

A copy of this declaration, and rule to plead, was served on A. D. Brown, as Supervisor, the Marshal stating

in his return his reason for assuming Brown to be Supervisor. (Rec., fol. 17.)

A plea in abatement, alleging that Brown was not Supervisor at the time process was served, and that since Oct. 7, 1875, that office had been vacant; that though appointed on that day, he had not accepted, qualified or acted in that office; and also a plea to the merits, with notice of special matter attached, pursuant to the practice in the State Courts, were interposed. (Rec., fols. 19–25.) The rule prescribed for the practice of the State Circuit Courts by the Supreme Court, is here printed:

"Whenever, in an action of law, the defendant interposes a plea in abatement, he may also, at the same time, plead the general issue; and in such case, if an issue of fact be made on the plea in abatement, such issue shall stand for trial first; and, if it be found against the defendant the trial shall at once proceed on the issue on the merits, unless the Court, on cause shown, shall allow a postponement. And if the issue on the plea in abatement is tried by jury, the issue on the merits, except when postponement is ordered, shall stand for trial before the same jury.

"When the issue in abatement shall be found for the defendant, the Court may, in its discretion, allow plaintiff to amend the declaration, and the cause shall thereupon proceed on such terms as the Court shall prescribe."

Whereupon the plaintiff filed a demurrer to the defendant's plea, assigning as grounds of demurrer, 1st, that the plea did not show how long the vacancy had existed, nor by what means it had occurred. 2nd, that the plea did not show who was Supervisor on the 23d of Nov., 1875, (which was the date of the service,) and 3d, that the defendant had not in the plea given or shown a better writ. (Record, fols. 25 to 27.)

This demurrer was filed Dec. 24th, 1875. In the files, and probably (judging from internal evidence of its con-

tents,) attached thereto, was an affidavit of one Danziger, made on the same day, stating that "he served a copy of demurrer to plea in abatement, on Geo. S. Clapp, Esq., attorney for the defendant in the above entitled cause, by depositing the same at the Post Office in the city of Grand Rapids, postage pre-paid, and directed to Geo. S. Clapp, Esq., attorney at law, St Joseph, Michigan, that being his true address, to the best of deponent's knowledge." (See this affidavit at fol. 27 of the Record.)

Feb. 23d, 1876, a common order was entered by the attorneys for plaintiff, reciting that there was due proof of the filing of the demurrer and of due personal service of it on defendant's attorney, and that more than ten days had since elapsed, and that no joinder in demurrer had been filed, nor copy thereof served, and defaulting the defendant for not joining in said demurrer. (Record, fol. 28.)

Feb. 8th, 1876, another common order was entered by plaintiff's attorneys, reciting the lapse of two days in term, and ordering the default made absolute.

Thereupon a jury was empannelled on the 29th day of May, 1876, who assessed the damages of the plaintiff at $6,273.32, and judgment was entered thereon for that amount. (Record, fol. 30.) And the defendant brings the case here on the record, by writ of error.

ERRORS.

The plaintiff in error alleges that there are errors in the record, for which he prays reversal of the judgment below, as follows:

The first count in the said declaration is bad, for the several reasons following, in that it does not allege that any meeting of the electors of said Township of St. Joseph was ever held for the purpose of determining whether the donation mentioned in said first count should be made to the Railroad Company therein mentioned, and in that it does not allege that any notice was given by the Supervisor of

said township, of a meeting of the electors thereof, to determine whether such donation should be made, and in that it does not allege that the bonds therein mentioned were executed by the Supervisor and Clerk of said township, and in that it does not allege that the said bonds were delivered to the State Treasurer, to be held and disposed of by him as required by law, nor that the said State Treasurer had ever delivered the said bonds to the said Rail Road Company nor that the State Treasurer had endorsed upon said bonds the date of their delivery by him, and in that it does not allege that the said Rail Road Company had, prior to the delivery of the said bonds to it, performed the necessary conditions precedent prescribed by the 9th Section of the Act therein mentioned. And that the said count being bad for the several reasons aforesaid, it is erroneously joined with the other counts in said declaration; and the said declaration is therefore bad and insufficient to support the said judgment; and the said Circuit Court erred in rendering judgment thereon.

II.

The second count in the said declaration is bad for the several reasons following: In that it does not allege that any meeting of the electors of said Township of St. Joseph was ever held for the purpose of determining whether the donation mentioned in said first count should be made to the Railroad Company therein mentioned; and in that it does not allege that any notice was given by the Supervisor of said township of a meeting of the electors thereof to determine whether such donation should be made, and in that it does not allege that the said bonds and coupons were delivered to the State Treasurer to be held and disposed of by him as required by law; nor that the State Treasurer had ever delivered the said bonds and coupons to the said Railroad Company; nor that the State Treasurer had endersed upon said bonds the date of their delivery by him; and in that it does not allege that the said

Railroad Company had, prior to the delivery of the said bonds and coupons to it, performed the necessary conditions precedent prescribed by the 9th Section of the Act therein mentioned. And that the said count being bad for the several reasons aforesaid it is erroneously joined with the other counts in said declaration, and the said declaration is therefore bad and insufficient to support the judgment, and the said Circuit Court erred in rendering judgment thereon.

III.

There was no sufficient proof of service of the demurrer of the said plaintiff to the defendant's plea to warrant the defaulting of the defendant for not joining in the said demurrer.

IV.

The default of the said defendant for not joining in the said demurrer should not have been absolute as to the whole plea, but should have been confined to the plea in abatement only.

V.

The said defendant was entitled notwithstanding his default in not joining in the said demurrer to the said plea to a trial of the issue joined by the defendant's plea to the merits.

VI.

The verdict of the jury in said cause was a verdict in tort and not a legal affirmation of the cause of action sued on, and was insufficient to support the judgment therein

The said Railroad Aid Law is here Printed.

SECTION 1. *The People of the State of Michigan enact*, That it shall be lawful for any township or city to pledge its aid to any railroad company now chartered, organized,

or that may hereafter be organized, under and by virtue of the laws of the State of Michigan, in the construction of its road, by loan or donation, with or without conditions, for such sum or sums, not exceeding ten per centum of the assessed valuation then last made, of the real and personal property in such township or city, as a majority of the electors of such township or city voting, shall, at a meeting or meetings called for that purpose, determine: *Provided*, That the total amount of outstanding indebtedness, exclusive of interest thereon, of any such township or city, incurred for any and all railroads, shall not exceed ten per cent of the assessed valuation of the same at any one time: *Provided*, That the amount, exclusive of interest thereon, which shall become due or collectable in any one year, shall not exceed two per centum of the assessed valuation of such township or city, at the time of issuing the same: *And, provided further*, That the total amount which the city of Detroit may raise for such purposes shall not exceed five per centum of the assessed valuation of the real and personal property of said city.

SEC. 2. It shall be the duty of the supervisor of any township, and the mayor of any city, to call a meeting or meetings of the electors of their respective township or city whenever a request in writing to do so shall be made by thirty tax paying electors of such township or city, and to give public notice thereof, at least twenty days previous to holding such meeting, by posting the same in not less than five of the most public places in such township or city, and by the advertisement of the same in some newspaper published in the County wherein such township or city shall be: *Provided*, In the case of cities or townships in which a daily or weekly newspaper shall be published, such publication shall be made in such newspaper at least once in each week for three successive weeks next previous to the holding of such meeting: *And provided*, in the case of the city of Detroit, such notice shall be published in at least three daily newspapers for ten consecutive days previous to the holding of such meeting. Such re-

quest and notice shall specify the amount of aid, the conditions, rate of interest, the time of payment and manner of executing the bonds, and other particulars in regard to such aid not otherwise provided herein: *And, provided further*, That no township or city shall, under the provisions of this act, hold more than two meetings in any one year, unless a majority of the tax-paying electors of such city or township shall sign such request in writing therefor

SEC. 3. At such meeting or meetings the township, city, or ward inspectors of elections shall act as inspectors of election. The electors shall vote by ballot, (such ballot to contain the words "aid to railroad—yes," or "aid to railroad—no," as the case may be,) and shall be subject to challenge as at other township or city elections; and the proceedings at such meetings to be held under the provisions of this act, shall, in case of townships, be governed, so far as they may be applicable, by the general laws of this State relating to township elections, and in the case of cities, by the laws regulating their respective municipal elections; and illegal and fraudulent voting shall be punishable in the same manner and to the same extent as at other township or city elections. A copy of the request, and also of the notice required by the provisions of section two of this act, shall be entered at large upon the records of the township or city, together with a statement of the result, and other essential particulars; and a certified copy of such record shall be in all courts and places, *prima facie* evidence of the facts therein set forth.

SEC. 4. Any township or city that may avail itself of the benefits of this act by voting aid to any railroad company, as provided herein, shall, within sixty days after the question of aid is determined by a vote of the electors of such township or city, as provided in section three of this act, issue its coupon bonds for the amount so determined to be granted, which bonds shall be in sums of not less than one hundred dollars each, and not more than one thousand

dollars each, and shall be payable at any time as determined upon by the electors of such township or city, not exceeding twenty years from the date thereof. Such bonds shall bear interest at a rate of not exceeding ten per cent. per annum, and shall have attached thereto the necessary and usual interest coupons, corresponding in dates and numbers with the bonds to which they are attached, which shall be signed by written signatures by the same person or persons executing such bonds. Such bonds shall, if issued by a city, be executed by the mayor and clerk or recorder thereof, as the case may be, under the seal of said city, and if issued by a township, they shall be executed by the supervisor and clerk thereof, and if any city or township issuing such bonds shall have a seal, the same shall be impressed upon each of such bonds. The bonds, and coupons attached thereto, shall be payable at the office of the treasurer of the county in which such township or city may be situate.

SEC. 5. Whenever any such bonds as provided by the provisions of this act shall have been issued as therein specified, the same shall be delivered by the person, persons or officers having charge of the same, to the Treasurer of this State, who shall give a receipt therefor, and hold the same as trustee for the municipality issuing the same, and for the railroad company for which they were issued, and to be disposed of by said treasurer in discharge of his trust as hereinafter provided.

SEC. 6. Upon receipt of any such bonds from any township or city, in aid of any such railroad company, the Treasurer of this State shall immediately register or record the same in a book or books to be kept by him for that purpose, in his office, which record shall show the amount, date and number of each bond, the rate of interest which it bears, by what township or city issued, to the benefit of what railroad company the same are issued, and the time when payable, which record shall be always open for the inspection of any citizen of this State, or other interested per-

son. Such bonds shall be safely kept by said treasurer, for the benefit of the parties interested, and be disposed of by him in the following manner: That is to say, whenever any rail road company, in aid of which any of such bonds may have been issued, shall present to said treasurer a certificate from the Governor of this State that such railroad company has in all respects complied with the provisions of this act, and is hereby entitled to any of such bonds, the same, or such of said bonds as said company shall be entitled to receive, shall be delivered to said company, the treasurer first cutting therefrom, canceling, and returning to the municipality, the past due coupons. The treasurer shall indorse upon each of said bonds the date of such delivery and to whom the same were delivered, and the same shall draw interest only from the time when so delivered; and the treasurer shall notify the clerk of the township, or recorder or clerk of the city issuing the same, of the date of the delivery of its bonds to such railroad company. The railroad company so receiving such bonds shall pay the State Treasurer one-tenth of one per centum of the par value of all such bonds so delivered, which shall be received by him in full payment of all fees and charges for the custody, recording, endorsing, and delivery of said bonds, which money shall be paid into the State Treasury. And in case any bond so delivered to said treasurer by any such township or city shall not, within three years from the time when the same were received by him, be demanded, in compliance with the terms of this act, the same shall be canceled by said Treasurer, and returned to the proper officers of the township or city issuing the same.

SEC. 7. In case any city or township issuing bonds as heretofore provided in this act, shall fail to pay the bonds, or the interest coupons, or to deposit with the treasurer of the county in which such township or city is situated, a sufficient sum of money to pay the bonds or the coupons, which it may have issued as aforesaid, which may then be due, as by the terms of said bonds or coupons, the

county treasurer of such county shall certify the same to the clerk of the board of supervisors of such county, or in case of the city of Detroit, to the assessor thereof, stating the amount so due and unpaid by such township or city, whereupon the board of supervisors of such county, or such assessor, as the case may be, shall cause the same to be assessed, levied, and collected from such township or city, with other county or city taxes, and in like manner, adding to the amount thereof, interest at the rate specified in said bond, for one year, and the same shall be paid to the county treasurer by the treasurer of such township or city; and upon the receipt of such money, the county treasurer shall pay to the holders thereof, the principal or interest for which such money may have been collected, with the interest thereon, and cancel and return such bonds or coupons to the township or city to which the same may belong.

SEC. 8. In case any township or city shall avail itself of the benefits of this act, by the issue of bonds or other evidence of debt, in the aid of any railroad company as by this act provided, such township or city shall, each year, by its proper authorities, after receiving the notice as herein provided, from the State Treasurer, of the delivery of its bonds to the proper railroad company, so long as such bonds or other evidence of debt remain unpaid, levy, assess and collect upon the taxable property of such township or city, a sufficient sum of money to pay all bonds, or interest upon the same, as either the bonds or interest thereon shall become due; and the full faith and credit of any township or city so issuing any such bonds or other evidence of debt is hereby pledged for the full payment of both principal and interest thereon; and the same are made hereby, valid and legal charge upon the taxable property of the township or city issuing the same.

SEC. 9. No such bonds or other evidence of indebted- shall be delivered to such company until it shall have complied with the conditions voted, and completed its road-bed and ironed its road with the usual T, or such other rail as may be used by first class railroads, through the municipal-

ity issuing the same, or to the termination thereof, if said road shall terminate therein; nor until said company shall have completed their road as aforesaid, through such municipality, or from the termination of said road if it terminates therein, to some connecting line of railroad duly completed and in full operation, or to the initial or starting point of such road. And in case such bonds shall have been issued by a municipality not upon the line of such road, the same shall not be delivered until said road shall be completed and ironed, as aforesaid, through the municipality adjoining thereto: *Provided*, That in case of the voting of aid by any township or city, located six miles or more from any part of said railroad, no such bonds shall be delivered until at least twenty miles of said road-bed and railroad shall have been completed and ironed, as aforesaid, from the terminus of said railroad nearest to such aiding city or township: *And provided further*, That in the case of the termination of said railroad, or the making of such crossing, or intersection of another railroad within the limits of any such aiding municipality, such bonds may be delivered when the said road-bed and railroad shall have been completed and ironed, as aforesaid, for the distance of six miles from such terminus or point of intersection.

SEC. 10. The provisions of this act are hereby extended so as to authorize any incorporated village to vote aid to the extent, in the manner, and subject to the conditions and provisions of this act in relation to cities. In case any township has not voted such aid, any village formed in whole or in part from such township may vote such aid, and when any such village has voted such aid, it shall not be liable to a further tax for that purpose by a vote of the township, and it shall be the duty of the president of any village to call a meeting or meetings of the electors of his village as provided in section number two of this act for cities and townships. The bonds contemplated in this act, if issued by a village, shall be executed by the president and clerk or recorder thereof, as the case may be,

as provided for cities and townships in section number four of this act: *Provided*, That whenever a village has not voted aid to the full extent of the provisions of this act, a further aid by township or village may be granted to an amount equal to the difference between the aid already granted and the full amount permitted by the provisions of this act.

SEC. 11. This act shall take immediate effect.

Approved March 22, 1869

POINTS AND AUTHORITIES.

The first special count in the plaintiff's declaration does not set forth sufficient facts to entitle the plaintiff to judgment.

It is not alleged that any notice of a meeting of electors was given, or that any such meeting was held, for the purpose of determining whether the bonds described should be issued.

There is no allegation that the bonds were executed by the Supervisor and Clerk of the township, nor that they were delivered to the State Treasurer, nor that he delivered them to the Rail Road Company. Nor that the Rail Road Company performed the conditions precedent to entitle them to the bonds, nor indeed that any of the steps prescribed by the Statute under which it is claimed the bonds were issued were taken.

This count amounts to no more than a bare allegation that such a statute was passed, that the Rail Road Company was a corporation within its meaning, and that the township made and delivered to it these bonds, and that the plaintiff became the holder thereof for value

None of the cases yet decided by this court go to the extent of holding that these facts without more would authorize a recovery by the plaintiff.

The giving notice of the meeting of the electors for example, is an essential prerequisite to the assumption by

the township, of the obligation created by such bonds.

There was nothing on the face of the bonds in the way of recital, and they did not purport to have been executed under the Act mentioned in the declaration at all. There was nothing therefore in the nature of an estoppel by recital on which the plaintiff relied.

The same observations may be made respecting the other matters above mentioned, and made by the Statute of the essence of the proceedings to the issuing of the bonds of the township. This court declared the substance of the doctrine held by it on the subject of municipal bonds in

The County of Warren vs. Marcy, 97 U. S. 104.

where the court said, "We have substantially held that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves by the authorities whose primary duty it is to ascertain it."

An extended reference to the cases on this subject is supposed to be needless, for the reasons that they are all epitomized in the abstract above quoted, and are so recent as scarcely to be out of the mind of the court.

In the case of Pine Grove vs. Falcott, 19 Wal. 666, no question was involved in the discussion or decision, except the *validity* of this Statute.

The making and delivery of such bonds in the name of the township can only lawfully be done upon the conditions and under the restrictions imposed by the Act:

Head vs. Providence Ins. Co., 2 Cranch, 127.
Bank of U. S. vs. Dandridge, 12 Wheat., 64.
McClure vs. Township of Oxford, 94 U. S. 429.
Trustees of Paris Township vs. Cherry, 8 Ohio St. 564.
Hoyt vs. East Saginaw, 19 Mich., 39.

Talmadge vs. North American Coal &c. Co., 3 Head. (Tenn.) 337.
Dey vs. Jersey City, 19 N. J., Eq. 412.
Argenti vs. San Francisco, 16 Cal. 255.

And a declaration framed for the purpose of recovery thereon must show that such conditions and restrictions have been observed, or it must show the existence of such facts as create an estoppel against the defendant's denying them.

Nor are these defects aided by verdict. For whatever may be the construction to be put upon the final proceedings, including the verdict in this case, whether they amounted simply to an assessment of damages, as we contend they do, or whether they import a trial upon the issue joined by the plea to the merits, the result would be the same.

For it cannot be presumed from such verdict that the facts omitted to be stated in the count, and necessary to entitle the plaintiff to recover were proven on the trial.

The rule is, that the particular thing which is presumed after verdict to have been proved, must always have been such as can be implied from the allegations on the record by fair and reasonable intendment.

It can not be implied from the allegations on the count in question by any fair and reasonable intendment, that the facts made necessary to the validity of the bonds by the Rail Road aid law existed.

Under the practice in Michigan, since the abolition of special pleading on the merits, the issue is a general one joined on the declaration, and the case is tried on the allegations contained in it. Matter, which by the common law must have been specially pleaded, is attached to the plea of the general issue. So that all the plaintiff must make out in order to entitle him to recover is simply what he alleges in his declaration, and he need not meet any matter which the defendant's plea and notice brings forward.

1 Green's Prac., Mich. 276, (Ed. of 1876).

These matters are alluded to in order to show that the old rules in reference to the helping out of a defective declaration by pleading over have no place under our system.

The first count being insufficient, the whole dec aration is thereby rendered bad and a general judgment thereon is erroneons.

"If the jury find entire damages on all the counts, the judgment must be entire, in which case, if one of the counts be insufficient, judgment will be arrested, or a writ of error be substantiable."

1 Chitty on Plead., 411, (13th Am. Ed.)

This argument applies to the 2d as well as the 1st of the above assignment of errors.

II.

The third assignment of error is based upon the ground that the paper in the record purporting to be an affidavit, was insufficient evidence that any copy of the demurrer had been served. The entry of the default was the act of the attorney and not of the court, and the recitals therein must depend for their efficacy upon what the record showed. The affidavit was invalid and constituted no proof for the reasons, that

1st. It was without a venue.

2d. It did not show that the copy mailed was a c of the demurrer in that case.

3d. It did not show that the place of residence of defendant's attorney was that stated, or was known to the deponent, nor that he had any relation to the case which would give him reason for knowing.

III.

The default of the defendant should have been limited in its consequences to the plea in abatement. The practice under the rule (102) is different from that at common law.

Under the rule the plea in abatement and the plea to the merits, are both interposed together. The plea to the merits required no further step on the part of the defendant, and he could not be defaulted on it for not pursuing the other pleading. The consequence of a default on the plea in abatement was to leave the case to stand for trial on the plea to the merits. The default should therefore not have been absolute, but limited to that branch of the case on which the default had been suffered. If it be said that the language of the record in the statement of what was done before the jury (fol. 30.) is wide enough to imply that there was a trial on the merits, the answer is that this part of the record is to be interpreted in connection with the rest, and from that it appears that the defendant had been bound by the entry of default, and had no legal standing by the record to do anything except to attend an assessment of damages.

For that reason it is submitted that the action of the jury was practically no more than an assessment of damages. And here recurring again to what was said as to the character of this entry in the argument on the 1st point, the further proposition is submitted that a judgment rendered on default has far less efficacy in healing defects in pleading than one rendered on a verdict.

IV.

The verdict, if it be treated as one upon the merits is fatally defective. It does not respond to the allegation that the defendant *undertook and promised*, which is the ultimate matter a jury must find in an action of *aisumpsit*.

That the verdict must respond to the declaration, and must affirm the substance of its allegations, and that a verdict in tort on a declaration in an action *ex contractu* and *visa versa*, will not support a judgment, is doctrine well settled in this court and universally.

Garland vs. Davis, 4 How. 131, and the authorities therein cited.
Scudder vs. Bloomfield, 3 N. J. Law, 950.
Smith vs. Raymond, 1 Day, 189.
Hickman vs. Byrd., 1 Mo., 495.
Goulds' Pleading, Chap. 10, Sect. 9.
Comyn's Dig. Title, Pleader, § 24.

It is therefore submitted the judgment ought to be reversed.

H. F. SEVERENS,

Counsel for Plaintiff in Error.